

June 5, 2003

OPP-2003-0167

Ms. Linda Fisher
Mr. Stephen L. Johnson
Mr. James J. Jones
USEPA Headquarters, Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

(23PP)

Environmental Protection Agency
Public Information and Records Integrity Branch
Information Resources and Services Division
Office of Pesticide Programs
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket OPP-2003-0167

Dear Ms. Fisher, Mr. Johnson and Mr. Jones:

As requested, we are submitting a preliminary copy of this letter to EPA for review. A final copy of this letter, including additional signatories, will be submitted to the EPA docket no later than Thursday June 12, 2003.

The undersigned 20 groups, representing more than 15 million individuals, strongly oppose the granting of an emergency exemption for the use of flowable carbofuran as described in the Federal Register Notice published on May 21, 2003 for Docket OPP-2003-0167 (Receipt of Applications for Emergency Exemption, Solicitation of Public Comment). This notice pertains to exemption requests from three state Departments of Agriculture (LA, TX and OK) to treat up to 2.4 million acres of cotton with 1.2 million pounds of the flowable form of carbofuran for cotton aphids. This is at least the fifth year in a row that the states have requested this same "emergency" exemption.

The Federal Register notice states that in regards to birds and wildlife the U.S. Environmental Protection Agency (EPA) "believes that the proposed use of flowable carbofuran on cotton could pose a risk similar to the risk assessed by EPA under the Special Review of granular carbofuran." The vast amount of information available in the scientific literature relating to extreme toxicity of all formulations of carbofuran to wildlife supports that assumption. During EPA's Special Review of Granular Carbofuran in the early 1990s, the U.S. Fish and Wildlife Service (FWS) sent a series of letters to the EPA (attached) urging the cancellation of all forms of carbofuran. This included a letter dated March 10, 1992 in which the FWS explicitly states that "*the Agency (EPA) should exercise its responsibility under FIFRA by cancelling all forms of carbofuran.*" Nothing has changed in the last ten years to reduce the risk or change that opinion.

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The emergency exemptions requested by these states will dramatically increase carbofuran use and treated acreage. According to USDA's National Agricultural Statistics Service (NASS), the total carbofuran active ingredient (a.i.) applied in all states on all crops in 2001 was 872,000 pounds. Of that amount, 116,000 pounds were applied to cotton. (NASS Database Summary, <http://www.pestmanagement.info/nass>). The requested emergency exemptions would authorize 1.2 million pounds a.i. of carbofuran to be applied to cotton in three states. This is more than ten times the amount applied to cotton nationwide in 2001; it is several hundred thousand pounds more than all 2001 carbofuran uses combined. The emergency exemption requests propose to apply carbofuran at a rate of 0.5 pounds a.i. per acre. There is no justification for this proposed heavy application rate. NASS data shows that, for every year from 1994 to 2001, the average application rate of carbofuran to cotton never exceeded 0.35 pounds a.i. per acre.

As you will recall, in June 2002, 55 conservation, environmental and animal welfare groups from across the country strongly opposed a Section 18 emergency exemption application for the use of granular carbofuran on 100,000 acres of rice in Louisiana based on the extreme toxicity of this product to birds and other wildlife. After evaluating that case and reviewing the documentation associated with the Special Review of granular carbofuran, EPA decided to revoke its permission to the Louisiana Department of Agriculture because EPA determined that an emergency program was no longer supported in the state and that the use of granular carbofuran under the exemption may cause unreasonable adverse effects to the environment. EPA also cited overwhelming public opposition to the permit. Based on the large amount of scientific evidence available, we believe that EPA made the right decision. Given that decision, EPA should do the right thing again, and therefore we strongly urge the EPA to deny each of the permits for the Section 18 emergency use of flowable carbofuran.

Because of the similarities in both toxicity and associated risks between the flowable and granular forms of carbofuran, we incorporate by reference our June 28, 2002 letter, which is attached. In addition to the information and comments conveyed in our June 28 letter, we have the following concerns:

- 1) Flowable carbofuran is as toxic as the granular formulation and therefore poses similar hazards to wildlife.**

EPA's Special Review of carbofuran in 1991 (56 Fed. Reg. 64621) concluded that granular carbofuran posed unreasonable adverse risks to birds. EPA evaluated the avian risk posed by granular carbofuran based on data describing toxicity, exposure, index of relative risk, field studies, bird poisoning incidents, ecological considerations, and the toxicity and relative risk of alternative pest control measures. Based on that risk assessment EPA drew several conclusions regarding carbofuran including 1) that carbofuran is highly toxic to birds, 2) predatory and scavenging birds can be secondarily poisoned when they ingest organisms that were exposed to carbofuran, 3) many birds have been killed by "proper use" of carbofuran (documented by field studies and over 80 separate poisoning incidents), 4) carbofuran presents a greater risk to birds than alternative chemical control methods, and 5) there are no demonstrated conditions under which granular carbofuran can be used without presenting unreasonable risk. These findings from the Special Review are directly relevant to the present emergency exemption requests for flowable carbofuran.

A review of current scientific literature indicates that, regardless of its formulation, carbofuran

is extremely toxic to birds. Given the high level of toxicity of all formulations and the similarities in exposure routes the risks posed by the flowable form are as great, if not greater than, those posed by the granular form. A review of field studies and other data documenting poisoning incidents verifies that birds have been lethally exposed to flowable carbofuran; exposure has been confirmed in multiple crops, in multiple geographic locations and via various application methods (e.g., drip irrigation, ground rig, and aerial). Avian exposure routes for the flowable form include direct ingestion of contaminated items, such as superficially contaminated vegetation, invertebrates, and grit. Other documented routes of exposure include preening, drinking and bathing in contaminated water, respiratory inhalation and dermal absorption. As with the granular formulation of carbofuran, secondary exposure can occur when an avian predator or scavenger eats a bird or other animal that had been exposed to carbofuran.

A wide variety of bird species are documented as having been poisoned by flowable carbofuran, including waterfowl, upland gamebirds, shorebirds, woodpeckers, raptors (including the Bald Eagle, Northern Harrier, Golden Eagle, and Great Horned Owl), and numerous species of songbirds. Much of this information on flowable carbofuran was collected and reviewed by EPA and the FWS during the Special Review that EPA conducted on granular carbofuran in the early 1990's. We strongly recommend that EPA review these data again, and look more thoroughly at the data that has been compiled more recently for its own re-registration review of all forms of carbofuran. Although the Special Review was conducted 10 years ago, nothing has occurred in the meantime to reduce the risks associated with carbofuran.

As mentioned above, the Director of the FWS has written to the EPA in the past urging cancellation of all carbofuran registrations (FWS Director's letter to Linda Fisher dated March 10, 1992 and FWS Director's Letter to Lynn Goldman dated July 11, 1994.) FWS has advised EPA that "Laboratory data verify that carbofuran is among the most highly toxic pesticides to birds...Birds can be lethally exposed to carbofuran even when it is applied with great care... Despite extensive study, it has not been demonstrated that there are any conditions under which carbofuran can be used without killing birds." Scientists around the country concurred with these viewpoints.

If these emergency exemption applications were to be granted, the impact on wildlife could be devastating in this situation because of 1) the vast amount of acreage proposed for treatment (up to 2.4 million acres), 2) the large amount of pesticide to be applied (up to 1.2 million pounds), 3) the large number of federally and state listed species and species of conservation concern that are likely to be present, 4) the extensive persistence of carbofuran in the environment-up to 120 days, and 5) the timing and location of the applications, which could potentially impact millions of migratory birds that will be migrating south along the Central Flyway where these three states are located.

On page 10 of the Texas Department of Agriculture's application, under their discussion of impacts to wildlife, they address only those species listed under the Endangered Species Act (ESA). They fail to acknowledge or address species that are protected under the Migratory Bird Treaty Act or those birds included in the Birds of Conservation Concern 2002 list developed by the FWS. The Birds of Conservation Concern report identifies those migratory non-game species that, without additional conservation actions, are likely to be candidates for listing under the ESA. This report is the foundation for much of the bird conservation that is currently taking place in the United States and should certainly be utilized in assessing risks to birds.

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In addition, the Texas Department of Agriculture has incorrectly assessed the number of species that utilize cotton fields. In their letter they assert that cotton aphids are "not an attractive diet for birds" and that "many bird species do not seem to readily perch on grown cotton plants." Had they completed a consultation with the FWS or with their state wildlife agency or conducted a review of the literature on this subject, they would know that more than 180 bird species have been documented to occur in cotton fields (see attached table). EPA possesses multiple studies that examine the use of cotton fields by birds. More than 35 field studies were submitted to EPA during the 1990s as a part of EPA's review of chlorfenpyr. We strongly encourage EPA to review that information. Not only are most if not all of the species that utilize cotton protected under the Migratory Bird Treaty Act, but some are considered Birds of Conservation Concern by the FWS.

2) The EPA has failed to complete required consultation with the U.S. Fish and Wildlife Service and has not requested input from State Wildlife Agencies regarding the impact of carbofuran on protected species.

EPA has both a legal and ethical obligation to seek input from other government agencies with wildlife expertise when a highly toxic pesticide may affect protected species. As previously stated, birds killed by carbofuran include a large number of species that are protected under the ESA and Migratory Bird Treaty Act. EPA must consult with the FWS under ESA Section 7 to assess the impacts that the approval and use of carbofuran would have upon threatened and endangered species. There is no doubt that approving these emergency exemptions "may affect" listed species and in fact, such a set of actions by EPA would be "likely to adversely affect" listed species.

While information regarding wildlife risks was exchanged between EPA and FWS during the course of the Special Review of granular carbofuran in the early 1990s, there is no evidence of recent communications on carbofuran between the agencies. At a minimum, EPA should have obtained an updated list of known carbofuran poisonings and a list of species that would be at risk in the specific areas where the carbofuran is to be applied in order to adequately assess the risks to wildlife. Defenders of Wildlife contacted the EPA immediately after the Federal Register notice was published on May 21 to ascertain whether the EPA had requested or received copies of responses from the FWS in regards to the Section 18 application from Texas. EPA responded that they have not received input from either the Texas Parks and Wildlife Department or the FWS. Given EPA's responsibility for assessing ecological risks, EPA is obligated to take a proactive approach in contacting wildlife related government agencies and seeking out relevant information on ecological impacts. It appears that the only agencies that EPA regularly notifies and seeks advice from are USDA and state departments of agriculture. EPA's standard operating procedure regarding consultation and input on wildlife-related matters is evidently not to request advice or a consultation or to even give notice to other federal and state agencies that are charged with protecting natural resources.

3) The proposed use does not constitute an emergency.

The application letter dated Feb. 11, 2003 from Phil Tham at the Texas Department of Agriculture states that "*I assume the procedures from last year remain the same. Since you indicated last year that if there were no changes from the previous year, a letter for this repeat*

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application was all that was needed" and "The main justification for requesting Furadan 4F, is to allow growers the option to use alternative chemistry in a rotation strategy for "resistance management." Clearly the states and the EPA consider the use of flowable carbofuran on cotton to be a routine use. Texas, Louisiana and Oklahoma have applied for and received an emergency exemption for the use of flowable carbofuran on cotton for every year since at least 1999. A further review of the EPA database indicates that these are not the only states that use Section 18 emergency exemptions as a means of obtaining carbofuran for routine use.

- Arkansas applied for exemptions for cotton aphid in 1999, 2000, and 2001 and received one every year.
- California applied for exemptions for cotton aphid in 1999, 2000, 2001 and 2002 and received one every year.
- Louisiana applied for exemptions for cotton aphid in 1999, 2000, 2001, 2002 and 2003, and received one every year. Louisiana was also issued an exemption in 2002 for control of rice weevil, the only non-cotton application listed in the database.
- Mississippi applied for exemptions for cotton aphid in 1999, 2000, 2001, and 2002 and received one every year.
- Oklahoma applied for exemptions for cotton aphid in 1999, 2000, 2001 (in March and May), 2002 and 2003 and received one every year (including two in 2001).
- Tennessee applied for exemptions for cotton aphid in 2000, 2001 and 2002, and received one every year.
- Texas applied for exemptions for cotton aphid for 1999, 2000, 2001, 2002 and 2003, and received one every year.

Clearly states have been using the Section 18 process as a simple method of circumventing the re-registration process to obtain a pesticide that is not warranted safe for use.

4) The requirements for granting a Section 18 emergency permit have not been met.

A review of the circumstances in this situation indicates there is simply not sufficient justification for the granting of a Section 18 Emergency Use permit under FIFRA and CFR Part 166-Exemption of Federal and State Agencies for Use of Pesticides Under Emergency Conditions, because: 1) there are management practices available to control aphids on cotton, 2) there are other effective chemical alternatives, and 3) the current situation will not create a significant economic loss.

Economically and environmentally feasible management practices are available to the cotton growers. The literature is replete with Integrated Pest Management (IPM) strategies, including non-toxic management strategies to control and to reduce the impact of aphid populations. These alternatives are further discussed below, under "Alternatives to Carbofuran." A number of effective chemical alternatives for controlling aphids also exist, including several newly labeled products as described in the Texas application letter. In that letter Phil Tram from the Texas Department of Agriculture acknowledges that there is currently no pesticide resistance to these products, although, as with all pesticides, resistance may develop in the future.

The present situation does not meet the definition of significant economic loss as required for the granting of a Section 18 emergency exemption. In evaluating an economic loss, the EPA must consider whether the reduction in profitability exceeds what would be expected as a result of normal fluctuations over a number of years and whether the loss would affect the long-term financial viability expected from the productive activity. The application letter from the Texas Department of Agriculture states that *"because emergency conditions have developed in the past, aphids have the potential to develop resistance....If conditions are suitable for aphid populations to thrive, this could be a major problem in the future if not this year."* Based on this letter and the letters from the other states with similar statements, it is apparent that an emergency situation does not currently exist and that if a problem does develop there are effective chemicals available to prevent a significant economic loss. Rather than preventing economic losses this year, growers want to use carbofuran in hopes of preventing losses *in future years* by delaying potential pesticide resistance.

We acknowledge and agree that pesticide resistance can pose a serious problem for growers; resistance needs to be addressed. However, dependence upon the "routine" yearly use of carbofuran is neither an ecologically nor agriculturally appropriate method for doing that. Potential resistance is best addressed by a combination of appropriate pesticide selection and IPM practices, including the implementation of appropriate non toxic management strategies. Using carbofuran to delay resistance of available pesticides is a "quick and easy fix," but it offers only a short term solution to the problem. Instead of continuing to rely on this short term fix, growers must begin implementing other available strategies to delay resistance over the long run. In addition, the existence of several newly labeled products indicates that active pesticide research and development are underway. New chemicals and other methodologies (e.g. juvenile growth hormones) will likely be available if or when resistance does develop in the future. Clearly, the requirements for granting a Section 18 exemption have not been met. There is absolutely no justification in this situation for approving Section 18 exemptions for the use of this extremely toxic pesticide in cotton.

5) Many viable alternatives to carbofuran exist.

Economically and environmentally feasible management practices are available to cotton growers. The literature is replete with information on Integrated Pest Management strategies, which include non-toxic management strategies such as reducing nitrogen applications, appropriate irrigation methods, and the use of natural controls. Unfortunately, it appears that the cotton growers have grown dependent on routine exemptions from EPA for the use of carbofuran. As in all agricultural situations, initiating appropriate management practices can take more time and can be more costly to implement than the application of pesticides. However, over the long run those methods will yield improved results and will be far less toxic to the environment and to non-target species. Cotton growers should be encouraged, if not required, to initiate and utilize sustainable, less toxic methods of pest control. Continuously offering them a "cheap and easy" fix with carbofuran is not in the best interest of growers or the environment.

6) A two week public comment period is insufficient.

The one week public comment period that was provided for the granular carbofuran emergency exemption last year was appalling and a two week comment period for this case is equally inappropriate, given the fact that the EPA received the emergency exemption applications in February and March. EPA has been reviewing these documents for several months. Interested stakeholders should be given sufficient time to evaluate the situation and respond. To give the public an extremely short comment period just prior to making a decision is simply not fair. In addition, a sound decision requires sufficient time for the comments from all stakeholders to be carefully reviewed, evaluated and addressed. In requesting an extension of the public comment period we were told that the EPA intends on making a decision on these permits next week. This means EPA will only have three days to address public comments, which seems to imply that information and comments submitted by non-industry stakeholders will be given only a cursory review.

7) Monitoring for and reporting of adverse effects should be required.

In the past no monitoring systems have been put in place to identify adverse effects that result from toxic chemicals permitted for use under Section 18 emergency exemptions. Last year when granular carbofuran was applied to 2500 acres of rice in Louisiana, the applicants were not required to specify exactly where the carbofuran was to be applied. Although the American Bird Conservancy and Defenders of Wildlife requested that the FWS be given that information, neither EPA nor the applicant provided it. This made it virtually impossible for the FWS to monitor the situation or determine independently whether any wildlife poisonings had occurred.

This is a serious flaw in the Section 18 permitting process. We strongly urge EPA to require that state agriculture departments provide the exact locations of treatments to the FWS as part of the application process, that EPA require monitoring of the fields during and after application, and that all adverse effects be reported to the EPA.

8) Delineation of the presence of threatened and endangered species should be required.

On page 16 of the Texas application for use of flowable carbofuran on up to 1.8 million acres of cotton, the applicant states that "Fish, Wildlife and Service or Parks and Wildlife Departments *may* be consulted for the current delineation of endangered and threatened species to ensure compliance with label restrictions." The fact that such delineation is optional is completely inappropriate. When permission to use highly toxic products is allowed, all measures to verify the presence of protected species should be undertaken.

Concluding Comments:

Based on the above information, it is impossible for EPA to conclude that "[t]he use of the pesticide under the exemption will not cause unreasonable adverse effects on the environment." 40 C.F.R. § 166.25(b)(1)(ii). Approving these emergency exemption requests would violate both FIFRA and EPA's regulations.

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We strongly oppose, for both the above stated reasons and those reasons discussed in our June 28, 2002 letter, the granting of an emergency exemption for the use of flowable carbofuran on up to 2.4 million acres of cotton in Texas, Louisiana and Oklahoma. We extend these comments to cover any future applications for use of this highly toxic compound and we urge EPA to consider these comments as they are preparing their Interim Reregistration Eligibility Decision for all forms of carbofuran.

Pesticide use should not jeopardize the health of our natural resources. Safer, less toxic alternative control methods are available and EPA should be doing all it can to encourage growers to use them. Thank you for giving us the opportunity to comment. We look forward to your response.

Respectfully Submitted,

Dr. Patricia Bright, Director, Pesticides
and Birds
American Bird Conservancy

Caroline Kennedy, Member Representative
National Pesticides Coalition

Dr. Diana Post, Executive Director
Rachel Carson Council

Dr. Richard A. Liroff, Senior Program
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Dr. Bette Stallman, Wildlife Scientist
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Scott Hoffman Black, Executive Director
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Jacob Smith, Executive Director
Center for Native Ecosystems

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A Partial List of Bird Species of Conservation Concern that Utilize Cotton Fields in LA, OK and TX

Common Name	Scientific Name	Area of Conservation Concern*	ESA Cotton Status	Use	Source
		National	FWS Regional	BCR Region	
Bunting, Painted	<i>Passerina ciris</i>	yes	2, 4	20, 21, 26, 27, 35, 36, 37	Known Temple et al. 1998 (MRID No. 44452614)
Bunting, Varied	<i>Passerina versicolor</i>	yes	2	35, 36	Possible Sullivan et al. 2002, BBS data
Chuck-will's-widow	<i>Caprimulgus carolinensis</i>	yes	4	22, 25	Likely Cooper 1981
Cuckoo, Yellow-billed	<i>Coccyzus americanus</i>	yes	2	35	Known Temple et al. 1998
Dickcissel	<i>Spiza americana</i>	yes		22, 36	Known Temple et al. 1998
Falcon, Prairie	<i>Falco mexicanus</i>	yes		18	Known Temple et al. 1998
Flycatcher, Acadian	<i>Empidonax virescens</i>			22, 25	Known Temple et al. 1998
Flycatcher, Scissor-tailed	<i>Tyrannus forficatus</i>	yes	2	19, 21, 25	Known Temple et al. 1998
Ground-dove, Common	<i>Columbina passerina</i>			27	Known Temple et al. 1998
Harrier, Northern	<i>Circus cyaneus</i>	yes	2	19, 21, 35, 36, 37	Possible Sullivan et al. 2002, BBS data
Hawk, Harris's	<i>Parabuteo unicinctus</i>			36	Possible Sullivan et al. 2002, BBS data
Heron, Little Blue	<i>Egretta caerulea</i>	yes	4	19, 21, 25, 26, 27, 31	Possible Meanley 1955
Kestrel, American	<i>Falco sparverius</i>			25	Likely Bohall-Wood and Collopy 1986
Oriole, Altamira	<i>Icterus gularis</i>		2	36	Possible Sullivan et al. 2002, BBS data
Oriole, Orchard	<i>Icterus spurius</i>			20, 22, 25, 26, 27	Known Temple et al. 1998
Owl, Burrowing	<i>Athene cunicularia</i>	yes	2, 4	18, 27, 31, 35, 36	Known Coulombe 1971
Parula, Northern	<i>Parula americana</i>			26, 27	Known Temple et al. 1998
Pyrrhuloxia	<i>Cardinalis sinuatus</i>			36	Likely Sullivan et al. 2002, BBS data
Sandpiper, Upland	<i>Bartramia longicauda</i>	yes		22	Likely Rottenborn 1996
Shrike, Loggerhead	<i>Lanius ludovicianus</i>	yes	2	20, 21, 35, 36, 37	Known Temple et al. 1998

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Sparrow, Bachman's	<i>Aimophila aestivalis</i>	yes	2, 4	22, 25	Possible Sullivan et al. 2002, BBS data
Sparrow, Botteri's	<i>Aimophila botteri</i>		2	37	Possible Sullivan et al. 2002, BBS data
Sparrow, Cassin's	<i>Aimophila cassini</i>	yes	2	18, 19, 20, 35, 36	Possible Sullivan et al. 2002, BBS data
Sparrow, Field	<i>Spizella pusilla</i>			20, 21, 22	Possible Sullivan et al. 2002, BBS data
Sparrow, Grasshopper	<i>Ammodramus savannarum</i>	yes		22, 37	Known Temple et al. 1998
Thrasher, Crissal	<i>Toxostoma crissale</i>	yes	2	35	Likely Sullivan et al. 2002, BBS data
Thrasher, Curve-billed	<i>Toxostoma curvirostre</i>			36	Known Temple et al. 1998
Thrush, Wood	<i>Hylocichla mustelina</i>	yes	4	22, 24, 25, 26, 27	Known Temple et al. 1998

Common Name	Scientific Name	Area of Conservation Concern*	ESA Cotton			Source
			National	FWS Regional	BCR Region	
Verdin	<i>Auriparus flaviceps</i>				36	Known Temple et al. 1998
Vireo, Bell's	<i>Vireo bellii</i>	yes	2, 4	18, 19, 20, 21, 22, 25, 26, 35, 36, 37		Known Temple et al. 1998
Warbler, Blue-winged	<i>Vermivora pinus</i>				22	Possible Sullivan et al. 2002, BBS data
Warbler, Cerulean	<i>Dendroica cerulea</i>	yes	2, 4	22, 24, 25, 35, 36, 37		Possible Sullivan et al. 2002, BBS data
Warbler, Prairie	<i>Dendroica discolor</i>	yes	2, 4	24, 25, 27,		Known Temple et al. 1998
Warbler, Prothonotary	<i>Protonotaria citrea</i>	yes	2, 4	20, 21, 22, 25, 26, 37		Known Temple et al. 1998
Whip-poor-will	<i>Caprimulgus vociferus</i>	yes		22, 24,		Possible Cooper 1981
Woodpecker, Ladder-backed	<i>Picoides scalaris</i>			20		Known Temple et al. 1998
Woodpecker, Red-headed	<i>Melanerpes erythrocephalus</i>	yes	2, 4	19, 21, 22, 24, 25, 26, 37		Known Temple et al. 1998
Wren, Bewick's	<i>Thryomanes bewickii</i>	yes	4	22, 25, 27, 37		Possible Sullivan et al. 2002, BBS data

*U.S. Fish and Wildlife Service 2002



June 28, 2002

Environmental Protection Agency
Public Information and Records Integrity Branch
Information Resources and Services Division
Office of Pesticide Programs
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Docket # OPP-2002-0124-OPPOSITION TO SECTION 18 GRANULAR CARBOFURAN USE IN LOUISIANA

Dear Mr. Johnson:

We the undersigned are writing to urge a reversal of the action by the U.S. Environmental Protection Agency (EPA) to permit the use of granular carbofuran in Louisiana based on a Section 18 exemption issued June 19, 2002. We do not believe the EPA acted lawfully in granting this Section 18 exemption. We contest the use of available granular carbofuran product on 2,500 acres of rice fields in Louisiana and further urge that the EPA rescind the Section 18 exemption for the use on any further acreage requiring the manufacture of new product.

We would like to register our grave concerns regarding the EPA's issuance of the permit for this acutely toxic pesticide. We find it appalling that such a decision was made without seeking input or comments from either the U.S. Fish and Wildlife Service (USFWS) or the general public. Given the toxicity of this pesticide to wildlife it is unthinkable that such a decision should be made behind closed doors without public input. The Louisiana Department of Agriculture and Forestry submitted its written application for Section 18 exemption on June 4, 2002. The EPA has acknowledged that the state of Louisiana had been in communication with them well before that date. Yet, the EPA proceeded without the 15-day public notice and comment period customary for emergency exemptions.

In 1989, the EPA published a Preliminary Determination to end all use of granular carbofuran because of its unacceptably high levels of bird kills. See 54 Fed. Reg. 3,744 (1989). Before EPA acted to cancel this dangerous pesticide, the sole manufacturer, FMC Corporation entered into a settlement agreement with EPA in May 1991, this Memorandum of Agreement (MOA) provided for a phase-out of nearly all granular carbofuran use. See 56 Fed. Reg. 64,621 (1991). This agreement was reached to avoid EPA acting to cancel the registration. The EPA clearly concluded that granular carbofuran poses an unacceptably high risk to avian species. Federal Courts have upheld the EPA's decision to phase out this pesticide despite challenges from FMC and various agricultural interests. See *NGSPA v. EPA*, U.S. Court of Appeals for the District of Columbia Circuit No. 95-1244 decided April 22, 1996. In the case cited, the Court found that there was sufficient support for EPA's determination that cancellation of carbofuran was justified because of the significant danger to birds. Nothing has changed to make carbofuran less of

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a risk to birds.

The Director of the USFWS has written to the EPA in the past urging cancellation of all carbofuran registrations. See USFWS Director's letter to EPA (Linda Fisher) dated March 10, 1992 and USFWS Director's Letter to EPA (Lynn Goldman) dated July 11, 1994. USFWS has advised EPA that "Laboratory data verify that carbofuran is among the most highly toxic pesticides to birds...Birds can be lethally exposed to carbofuran even when it is applied with great care...Despite extensive study, it has not been demonstrated that there are any conditions under which granular carbofuran can be used without killing birds." See the July 11, 1994 letter cited above. Scientists around the country concurred with these viewpoints.

Carbofuran is among the most highly toxic pesticides to birds. A single granule can kill a small bird. Granular carbofuran is very similar in size and shape to birdseed and is readily ingested by birds. In addition to the ingestion of granules, birds can be exposed by bathing in or drinking contaminated water, preying on exposed insects, and ingesting plants containing systemic residues of carbofuran. The systemic residues and metabolites in plants also poison non-target herbivores and their predators. Carbofuran is also acutely toxic to mammals and aquatic species; incidents of mortality in foxes, raccoons, and other wildlife are in the EPA files.

Carbofuran is known to have killed over 100 different species of birds including Bald and Golden Eagles, Eastern Bluebirds, Great Horned Owls, Red-tailed Hawks, Kestrels, Northern Pintails, and Blue-winged Teals. In 1989, the EPA estimated that 1 to 2 million birds were killed annually by carbofuran. A review of the EPA's Ecological Incident Investigation System database indicates that carbofuran is the pesticide associated with the greatest number of bird kills. Even when carbofuran is used strictly according to label directions it poses significant hazards to non-target organisms, including numerous species of birds protected under the Migratory Bird Treaty Act. Poisonings associated with the "proper" use of carbofuran in agriculture have been documented in at least 20 states. According to EPA records, over 30 incidents of bird kills have occurred following the application of granular carbofuran to rice fields. These include situations similar to the one at hand in Louisiana where fields are flooded prior to application.

In 1991, a Virginia state monitoring project documented wildlife mortalities on 10 of 11 farm sites where carbofuran was carefully applied in accordance with label instructions. After analyzing the results of this monitoring project, the Commonwealth of Virginia banned the sale and use of all granular formulations. Canada banned the use of granular carbofuran in 1998.

The Section 18 exemption issued on June 19, 2002 is in violation of the Endangered Species Act (ESA). FIFRA does not exempt the EPA from complying with ESA requirements. *Defenders of Wildlife v Administrator*, 882 F.2d 1294. (1989). ESA Section 7 is applicable to the registration of pesticides by EPA under FIFRA, requiring EPA to perform a Section 7 consultation. ESA Section 7(a)(2) mandates "Each Federal agency shall, in consultation with and with the assistance of the Secretary (of the Interior or Commerce), insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat." (16 U.S.C. § 1536 (a)(2)). An agency's duty to consult is triggered whenever it is determined that an action "may affect" a threatened or endangered species. (16 U.S.C. § 1536 (a)(3)).

The requirements of the ESA apply to EPA's registration of pesticides under FIFRA, including FIFRA Section 18 exemptions granted by EPA. Moreover, there is substantial scientific evidence that carbofuran not only "may affect" listed species, but has and is likely to cause significant adverse effects to listed species. Despite substantial evidence that carbofuran poses a considerable threat to listed species, the EPA has failed to consult with the USFWS to ensure that its use in Louisiana will not jeopardize listed species or destroy or adversely modify critical habitat. The application of carbofuran to rice crops in Louisiana poses a risk of substantial adverse impacts on listed birds including but not limited to the Bald Eagle. Clearly the ESA requires EPA to complete a formal Section 7 consultation with the USFWS in order to thoroughly address these impacts and ensure that listed species are not jeopardized and critical habitat is not destroyed or adversely modified as a result of EPA's FIFRA Section 18 exemption for carbofuran.

ESA Section 7(a)(1) requires all federal agencies to "utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of endangered the threatened species." (16 U.S.C. 1536 (a)(1)).

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The Supreme Court has interpreted this mandate to reflect "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978). EPA has not fulfilled even its most fundamental duty under the ESA to consult with the USFWS and ensure no jeopardy results to protected species from the use of carbofuran. It is hardly surprising given this failure to perform the substantive and procedural duties imposed by section 7(a)(2), that EPA has also failed its affirmative section 7(a)(1) obligations. In addition to the ESA violations, the Section 18 exemption violates the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Act 16 USC Section 668. According to the USFWS, the applicator and associated partners can be held criminally accountable for bird kills.

Granular carbofuran clearly does not meet the requirements for registration and should be cancelled pursuant to FIFRA section 6. Pre-existing tolerances for carbofuran cannot satisfy the safety standard of the FQPA and the tolerances therefore must be revoked under FFDCA section 408(b) and 408(e). In addition, to the legal concerns cited above, there is not sufficient justification for the granting of a Section 18 emergency permit under FIFRA and CFR Part 166-Exemption of Federal and State Agencies for Use of Pesticides Under Emergency Conditions, because: 1) there are management practices available to control the water rice weevil, 2) there are other effective chemical alternatives, and 3) this situation will not create a significant economic loss.

Economically and environmentally feasible management practices are available to the rice growers. The application for Section 18 includes an acknowledgment that rice farmers in the region have the option of draining infected rice fields and re-flooding them as an alternative method of eliminating the water rice weevil.

There are other effective chemical alternatives for controlling the water rice weevil. In the 1991 MOA the EPA and FMC agreed to phase out nearly all uses of granular carbofuran while equally effective rice weevil controls were being perfected. EPA allowed the use of granular carbofuran in rice until 1999, when it was assured that such effective alternative controls existed. Fipronil (Icon), Lambda-cyhalothrin (Karate), Zeta-cypermethrin (Fury, Mustang), and diflubenzuron (Dimilin) all can be used effectively to control the rice weevil. In the Louisiana application and the June 19 EPA Section 18 exemption, as well as the belated Federal Register notice, reference is made to the failure of timely applications of alternative pesticides, mostly due to lack of airplanes to apply preventative measures. This should not occasion use of a cancelled substance; action should have been taken by the applicant, the Louisiana Department of Agriculture and Forestry, and the growers to assure proper equipment (airplanes) was available.

The present situation in Louisiana does not meet the definition of significant economic loss. In evaluating an economic loss, the EPA must consider whether the reduction in profitability exceeds what would be expected as a result of normal fluctuations over a number of years and whether the loss would affect the long-term financial viability expected from the productive activity. Louisiana is expected to grow 525,000 acres of rice in 2002. The loss of 30% of the crop on 10,000 acres is 0.5% of the total Louisiana rice crop. This does not meet the definition of significant economic loss.

In the future we urge that the EPA, as a matter of routine protocol, seek input from the USFWS on pesticide related matters, especially when the pesticides being considered are known to kill non-target wildlife. Further the EPA should maintain transparency in the process by posting a public comment period for all future Section 18 applications.

It is clear from the Louisiana Section 18 application that they and five other states are planning to apply for a FIFRA Section 24(c) Special Use exemption for the use of granular carbofuran, this would expand the use of granular carbofuran. FMC has also submitted a supportive document for such special use. We strongly oppose any Section 24(c) use.

We urge EPA to rescind its June 19, 2002 Section 18 exemption for use of granular carbofuran in SW Louisiana rice fields and not permit the manufacture of any additional carbofuran for such use. Further, we request that the EPA consult with its Office of General Counsel and, that before EPA acts to continue its grant of this Section 18 exemption for carbofuran, the Office of General Counsel issue a written opinion on its legality.

Respectfully Submitted,

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